PUBLIC VERSION

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
THE LIBRARY OF CONGRESS
Washington, D.C.

In re	)	
DETERMINATION OF ROYALTY RATES AND TERMS FOR EPHEMERAL RECORDING AND DIGITAL PERFORMANCE OF SOUND RECORDINGS (*WEB IV*)	)	**Docket No. 14-CRB-0001-WR (2016-2020)**

LICENSEE SERVICES' REPLY IN FURTHER SUPPORT OF THEIR MOTION TO STRIKE SOUNDEXCHANGE'S CORRECTED WRITTEN REBUTTAL TESTIMONY OF DANIEL RUBINFELD AND SECTION III.E OF THE WRITTEN REBUTTAL TESTIMONY OF DANIEL RUBINFELD

Licensee participants Pandora Media, Inc. ("Pandora"), the National Association of Broadcasters ("NAB"), and iHeartMedia, Inc. (collectively, the "Services") respectfully submit this reply memorandum in further support of their Motion to Strike the Corrected Written Rebuttal Testimony of Daniel Rubinfeld and Section III.E of the Written Rebuttal Testimony of Daniel Rubinfeld ("Motion to Strike"). Given the short window of time for the parties to conclude discovery and prepare for trial, the Services respectfully request that the Judges expedite consideration of the Motion to Strike as their schedules reasonably allow.

INTRODUCTION

SoundExchange's voluminous opposition to the Services' motion to strike cannot obscure the straightforward fact that it has sought to introduce into this proceeding, without permission and in the guise of "corrected" testimony, some 15 pages of new analysis and 40-plus pages of new agreements. That "corrected" testimony, is, of course, nothing of the kind. SoundExchange

defends it as belatedly un-redacted rebuttal, but it is not proper rebuttal, and it is unquestionably untimely.

In a breathtakingly broad conception of what constitutes rebuttal, SoundExchange attempts to legitimize this augmented testimony on the basis that it somehow represents a response to the Services' direct-phase criticisms of the interactive services' benchmark that is the foundation of SoundExchange's case, as well as the Services' proffer of certain of their own direct license agreements as benchmarks. But in truth, the newly proffered testimony does neither. It does not actually respond to or refute any of the many shortcomings of the interactive service market identified by the Services' witnesses, nor does it rebut any of the Services' benchmarks. It instead merely presents alternative benchmarks – all of which were known and available to SoundExchange at the time it prepared it direct case – that SoundExchange claims corroborate Dr. Rubinfeld's interactive service benchmark valuation. Under this conception of proper rebuttal testimony, a party could, as SoundExchange has done here, hold back at the direct phase of these proceedings proposed benchmarks that it now identifies as being "of central importance," Opp. at 36, only to spring those on the opposing parties at the rebuttal phase on the specious ground that this further alleged corroboration of the party's direct case somehow constitutes proper rebuttal. The impropriety, and potential resulting prejudice, of such litigation tactics should be evident.

Further evidence of the flimsiness of SoundExchange's opposition is found in its remarkable effort to legitimize this improper testimony by somehow ascribing fault *to the Services* for failing to introduce their own analysis of the Apple agreements in their rebuttal testimony. This argumentation is a red herring; the sole relevant issue is whether anything in the Services' *direct case* filings permissibly enabled SoundExchange to introduce the challenged

testimony in its rebuttal. It did not. Moreover, because Dr. Rubinfeld's direct testimony did not include any Apple analysis (and specifically admitted that he was contractually barred from including it), the Services, even had they wished to conduct such an analysis in their own rebuttal filings, would have had nothing to rebut. SoundExchange's arguments amount to the absurd contention that the Services should have submitted preemptive surrebuttal of an analysis they had not seen and had no reason to believe was coming.

At the end of the day, there is no avoiding the conclusion that SoundExchange's gamesmanship, which involves attempting, on the flimsiest grounds, to introduce what it terms "critical" and "crucial" evidence into this proceeding at a time following the Services' submission of their rebuttal cases, is wholly improper.

ARGUMENT

I. SOUNDEXCHANGE HAS FAILED TO ESTABLISH THAT THE CHALLENGED TESTIMONY IS PROPER REBUTTAL

A. SoundExchange Misstates the Proper Standard for Rebuttal Testimony

The Services' Motion to Strike demonstrated the applicable standard for proper rebuttal testimony as established by the Judges' precedents: *i.e.*, testimony that "respond[s] to issues raised in the direct testimony of witnesses for the party opposite." *Order Granting in Part and Denying in Part Music Choice's Motion to Strike and Denying Motion by Sirius XM to Strike SoundExchange's Designation of Previous Testimony in its Written Rebuttal Statement* (PSS/Satellite II Docket No. 2011-1 ("*Satellite II*")) at 2 (Aug. 3, 2012) ("Music Choice Order"). Proper rebuttal testimony also must identify the direct testimony from opposing witnesses that it "expressly responds to." *Id.* at 3; *see also Satellite II* Rebuttal Hearing Tr. (8/16/2012) at 3785:2-8 (finding testimony to be improper rebuttal where it was "not responsive to issues raised in direct testimony of the opposing party").

In an effort to escape this precedent, SoundExchange draws on a single prior order to argue that all that is required is a "nexus" between the rebuttal testimony and issues or subjects raised in the opponent's direct testimony. *See* Opp. at 14. But the *Satellite II* order cited in support of that contention does not support so sweeping and unbounded a construction, particularly in the circumstances presented here. While that Order states that certain of the challenged testimony was proper rebuttal where it "attempts to show a nexus between the subject in question . . . and a purported *shortcoming* in the approach taken by Music Choice's expert witness," Music Choice Order at 2 (emphasis added), it does *not* state (or even suggest) that simply showing a "nexus" between rebuttal testimony and some "issue" or "subject" in the other party's written direct testimony alone is sufficient.[1] The point is simple: proper rebuttal testimony, as the name suggests, identifies errors in the opposing party's testimony and responds to them. *See id.* (stating that the paragraphs at issue "attempt to show the consequences of opposing expert's failure to take relative intensity of usage into account in analyzing what constitutes an appropriate royalty rate"). A party's assertion that further purported evidence in support of its case merely constitutes a sufficient conceptual connection or "nexus" to the opponents' direct case submissions, but does not expose a shortcoming in those submissions, invites unlimited, improper rebuttal testimony of exactly the type sought to be introduced by SoundExchange here.

SoundExchange strains to find support for its position in the Judges' ruling on Professor Roger Noll's rebuttal testimony in *Satellite II*. *See* Opp. at 14 n.6. There, the Judges actually found that "substantial parts" of the Noll testimony were not "classically within the confines of our rules on what is proper rebuttal testimony." At best, they concluded, it was "arguably

[1] Nor, therefore, does it support the even more extreme position – offered by SoundExchange without citation – that rebuttal testimony is acceptable "even if the opposing party did not directly discuss the underlying issue in its analysis." Opp. at 15.

responsive" to the subject matter raised in direct testimony by SoundExchange. *See Satellite II* Rebuttal Hearing Tr. (8/14/2012) at 3449:6-18 ("Noll Order"). Although the challenged testimony was admitted, the facts underlying that Order foreclose the suggestion that any testimony merely "arguably responsive" to the opposing party's direct case is proper rebuttal – or the even more extreme position that "where participants have offered competing benchmarks . . . evidence that bolsters or confirms a participant's benchmark is responsive to the 'subject matter' of an opponent's direct case." Opp. at 16, 23.

In the *Satellite II* proceeding, Dr. Noll's principal benchmark – fully presented in his direct-phase testimony – was a collection of 62 Sirius XM direct licenses with various record companies. After the parties' written direct statements were filed, but before the rebuttal testimony was due, Sirius XM executed an additional 23 such licenses, each of which was identical in form to those presented by Dr. Noll in his direct testimony. Dr. Noll included those additional direct licenses in his rebuttal testimony. Unlike Dr. Rubinfeld's corrected testimony here, the additional licenses submitted by Dr. Noll on rebuttal did not introduce a new benchmark or present any new analysis of that benchmark that SoundExchange and its experts had not had the opportunity to review or respond to prior to submitting their rebuttal case; they were essentially an update to the depiction of the marketplace agreements forming the basis of Sirius XM's rate proposal.[2] And because Dr. Noll had presented his analysis of the Sirius XM direct licenses in his direct testimony, SoundExchange and its experts had every opportunity to, and in fact did, analyze and respond to Dr. Noll's benchmark analysis in their rebuttal submissions – an opportunity that the Services here lack with respect to Dr. Rubinfeld's "corrected" testimony.

[2] As we discussed in the Motion to Strike (at 23 n.12) and discuss below, this is the precise situation intended to be covered by the parties' agreement in this proceeding to allow updates on rebuttal.

To be clear, the Services are not arguing that proper rebuttal can never bolster a party's own direct case, *see* Opp. at 14; rather, testimony that *solely* bolsters one's direct case is not proper rebuttal. SoundExchange itself has recognized the line beyond which proffered rebuttal testimony cannot cross: such testimony must be stricken where "it is offered only to bolster [a participant's] own direct testimony and as preemptive sur-rebuttal of attacks" of a party's direct case. *See* SoundExchange's Mot. to Strike Portions of Sirius XM Testimony as Improper Rebuttal (*Satellite II*) at 1, 3 (Aug. 3, 2012) ("SX Motion to Strike Portions").

Further, the Services are not arguing that proper rebuttal is limited to information received *after* the direct cases are submitted. *See* Opp. at 14. Information in a participant's possession prior to the direct-case filing may be proper rebuttal – assuming it meets the standard for rebuttal testimony and is not merely held back to sandbag the opposition. *See* SoundExchange's Mot. To Strike Section II of the Written Rebuttal Testimony of Sirius Satellite Radio Inc.'s and XM Satellite Radio Inc.'s Joint Expert John R. Woodbury (Docket No. 2006-1 CRB DSTRA ("*Satellite I*") at 1 (Aug. 9, 2007) (arguing that rebuttal testimony is not intended to allow a participant to "bolster [its] direct testimony" or to present an "alternative and entirely new theory" so as to "hamstring [the opposing participants'] ability to provide effective rebuttal testimony"). Nor are the Services suggesting that there is an *exception* for such post-direct statement information that necessarily allows it to be used. *See* Opp. at 14, 32 (citing Mot. at 23 & n.12). As the Motion to Strike makes clear, the Services reached a *private agreement* with SoundExchange that the parties could use their rebuttal testimony to update their direct cases to reflect new developments occurring since those direct cases were filed.[3] If such updating were

[3] Pandora's submission of its direct license with Naxos – a license similar to its license with Merlin entered into after the direct cases were submitted – is precisely such an update. It is not at all similar to SoundExchange's treatment of the Apple agreements – and certainly does not turn the latter into proper rebuttal testimony. *See* Opp. at 31.

already permitted under the prevailing rules and decisions, there would have been no need for such an agreement. What ultimately matters is not the timing of when the information came into the party's possession, but whether the proffered testimony meets the standards enunciated by the Judges. As we show in the following section, it does not.

B. The Challenged Testimony Fails To Meet the Standard for Proper Rebuttal Testimony: It Simply Introduces a New, Allegedly "Corroborating" Benchmark

Aside from contorting the governing legal standard, SoundExchange tries ineffectually to justify the challenged testimony on two fronts: that it rebuts the Services' criticisms of Dr. Rubinfeld's interactive-service benchmark valuation, and that it rebuts the Services' own benchmark analyses. Neither has merit.

1. Dr. Rubinfeld's Introduction of a New Apple Benchmark is Not Rebuttal of the Services' Criticisms of SoundExchange's Interactive Services Benchmark

In his written direct testimony, Pandora's principal economist Professor Carl Shapiro argued – based largely on the Federal Trade Commission's review of the Universal-EMI merger – that the market for interactive services does not appear to be workably competitive. *See* Written Direct Testimony of Carl Shapiro ("Shapiro WDT") at 12. Dr. Shapiro also posited that the repertories of the major record labels might be complementary rather than substitute inputs for interactive services. *Id.* at 6 n.7. NAB's expert Professor Michael Katz offered similar arguments, and also criticized the way the interactive service agreements had been incorrectly analyzed by SoundExchange experts in prior proceedings (leading to inflated statutory rates), and discussed the economic differences between subscription and non-subscription interactive services. *See generally* Written Direct Testimony of Michael Katz ("Katz WDT") at 30-42. In its Opposition, SoundExchange doubles down on the argument that Dr. Rubinfeld's valuation of

the Apple agreements somehow rebuts Drs. Shapiro and Katz's criticisms, not of the Apple agreements, but of the interactive service benchmarks.

As the Services' Motion to Strike established, that conclusion defies logic. While Dr. Rubinfeld's Apple analysis pays lip service to the above-mentioned criticisms of the interactive services market (*see* CRWT App. 2 at pp. 059-1-RR), it does not actually attempt to respond to, refute, or rebut them in any way. It does not, for example, explain why the interactive service market is competitive, establish that the major labels' respective repertories are substitutes for one another rather than complements, or address revenue differences between subscription interactive services and non-subscription interactive services.[4] To the contrary, Dr. Rubinfeld simply assumes that the Apple agreements are "not susceptible to" and "escape" those same criticisms. Even if proven (and it has not been), that would not say a thing about whether those criticisms are true or false as to the interactive services – it would merely be an attempt to defend the *bona fides* of the new and allegedly "better" Apple benchmark itself.

Dr. Rubinfeld also suggests that because the Apple agreements lead (at least in his view) to a fee level (or "benchmark value") roughly comparable to what he calculated from the interactive services agreements, any purported flaws in his interactive services analysis must not have had a "meaningful impact" on that analysis – basically, that they can simply be ignored. *Id.* at ¶ 3. But that does not follow either. Dr. Rubinfeld's logical leap in this regard relies on the

[4] It should also be noted that neither Professor Shapiro's nor Professor Katz's direct testimony was actually reacting to or criticizing the interactive-service model developed by Rubinfeld in his direct testimony or the "benchmark value" that flowed from it. Given the timing, that would have been impossible. Rather, they were addressing characteristics of the interactive-service licensing market more generally and adjustments that would need to be made were it to be used as a benchmark in the case (and, the case of Professor Katz, how that benchmark market had been incorrectly analyzed and adjusted in *past* proceedings). Thus, to the extent Dr. Rubinfeld's rebuttal testimony focuses on purported similarities between the "benchmark value" of the Apple agreements and the "benchmark value" he previously calculated for the interactive services, *see* Opp. at 059-1-RR ¶3, it does not rebut the actual criticisms of the interactive service market made by Professors Katz and Shapiro in their direct testimony, which did not address Rubinfeld's calculation of "benchmark value" in any way.

assumption that the Apple agreements – merely because they involve a non-interactive service – necessarily "escape" the problems that Professors Shapiro and Katz identify with respect to the interactive services. There is no reason to indulge that assumption. The Services' economists certainly have not argued, as SoundExchange suggests, that any agreements signed by "non-interactive" services are automatically valid benchmarks or more reasonably priced than interactive service. *See* Opp. at 23. (Rather, they have said rates will tend to be lower, whatever the service type, where there is effective competition among record company licensors and the ability of a service to steer plays towards or away from given record companies.) Moreover, as discussed in more depth below, there are in fact many reasons to believe that Dr. Rubinfeld's Apple valuation is equally as problematic and inflated as his interactive-service valuation.

The bottom line is simple: the fact that Dr. Rubinfeld has found a set of agreements with (on his analysis) effective rates as high as his interactive services benchmark does not, merely on account of their being "non-interactive," refute or rebut criticisms of that original benchmark, show those criticisms not to be "meaningful," or justify the high "benchmark value" he originally calculated. *Id.* To use SoundExchange's own words, this brand-new analysis does not in any way "analyze and respond to the shortcomings in the Services' direct case." *Id.* All it demonstrates is that Dr. Rubinfeld has found a new benchmark that he believes *corroborates* the *result* of his own original calculation.[5] That is not rebuttal. It is not supported by the *Satellite II* orders cited by SoundExchange,[6] and it would essentially mean that every new, corroborative

[5] As detailed in the Services' Motion, Dr. Rubinfeld is candid that the testimony is offered to corroborate his original benchmark. *See* Motion to Strike at 9, 22-23; *see also* Opp. at 59-1 ¶ 3 (comparability of "benchmark values" between Apple analysis and interactive-service analysis suggests the original adjustments are "appropriate").

[6] *See* pp. 3-5, *supra.* As described at length above, neither the Music Choice Order nor the Noll Order stands for the limitless proposition advocated by SoundExchange that "where participants have offered

benchmark a party introduces can be cast as rebuttal as long as an opposing party criticized the original benchmark the party wanted to rely on.

2. Dr. Rubinfeld's Introduction of a New Apple Benchmark is Not Rebuttal of the Services' Benchmarks

SoundExchange also argues that the Apple analysis rebuts Pandora's Merlin benchmark and iHeart's Warner benchmark because it represents a benchmark – allegedly in the same "core set" of agreements – that those parties' experts elected not to rely on. *See* Opp. at 24. But for all the reasons discussed above, simply offering a new, different benchmark and claiming it is better than the one offered by your opponents does not constitute *rebuttal* of your opponent's benchmarks – *i.e.*, it does not "analyze or respond to the shortcomings" of your opponents' benchmarks. *See id.* at 23.

The fact that the Apple agreements involve [redacted] a non-interactive service – and that Merlin and iHeart-Warner agreements involve other non-interactive services – does not alter that conclusion. As noted above, the Services' experts do not put forward the simplistic view that any non-interactive agreement is necessarily valid for rate-setting. It therefore does not follow that those experts "inexplicably disregarded" a necessary component of some "core set" of non-interactive services by not choosing to include it in their direct testimony. *See* Opp. at 23, 24. There are obviously many agreements besides the Apple agreements that the Services did not feature as benchmarks in their direct testimony; that does not make all of those agreements candidates for rebuttal merely because they may have some characteristics similar to the Services' benchmark agreements, or because SoundExchange believes those agreements to constitute a more favorable benchmark.

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competing benchmarks . . . evidence that bolsters or confirms a participant's benchmark is responsive to the 'subject matter' of an opponent's direct case." Opp. at 16.

Moreover, the assumption underlying SoundExchange's argument – that the Apple agreements "directly meet[] the Services' espoused gold-standard benchmark of non-interactive, non-subscription licenses," (*Id.* at 24) – also appears to be wrong as a matter of *fact*. As an initial matter, Dr. Rubinfeld's contention that Apple (a so-called "power buyer") willingly agreed to pay effective rates of [redacted] per performance when it could have paid under the statutory license at .24 cents per performance is economically irrational – unless, of course, there is more to the agreements than meets the eye.[7] What limited discovery has been taken to date concerning the agreements confirms that to be the case. To start, the iTunes Radio agreements that Dr. Rubinfeld relies on [redacted]. *See, e.g.*, [redacted] (attached as Exhibit A to the Declaration of Todd Larson dated March 20, 2015 ("Larson Decl.")). And of course Apple's primary business is selling iPhones, computers, and other devices on which music can be played – which no doubt impacts its decisions as to what it is willing to pay for such music.

What is more, documents from the record labels' own files suggest that [redacted]

[7] Dr. Rubinfeld's valuation also flies in the face of his own argument that the "the statutory rate operates as a ceiling for any negotiated royalty rate." Rubinfeld WDT at n.76 (quoting "Copyright Law Revision," Studies Prepared for the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, United States Senate, 86th Congress, First Session, Study 5, "The Compulsory License Provisions of the U.S. Copyright Law," p. 49).

[redacted]

(attached as Larson Decl. Ex. B. Even with such accounting maneuvers, [redacted]

[redacted]

(attached as Larson Decl. Ex. C).

This is what is evident merely from the very limited discovery to date.[8] The point, for purposes of this motion, is not the precise number. It is that SoundExchange's claim that Dr. Rubinfeld's corrected testimony is rebuttal hinges on the assumption that his new Apple analysis corroborates the "benchmark value" of his interactive service model. *See* CWRT App. 2 at 059-1-RR at ¶ 3. There is simply no reason to accept that assumption – and many reasons to reject it. Furthermore, it is clear that a proper analysis of, and response to, Dr. Rubinfeld's Apple valuation is a complicated endeavor involving [redacted] and questions as to

[8] SoundExchange has in fact failed to produce many of the related agreements between Apple and the record companies that bear on the valuation of the iTunes Radio agreements, including the [redacted]. This puts the lie to SoundExchange's claim, *see* Opp. at 3, that the Services "had ample opportunity to analyze" the terms of the Apple deals.

how revenue from [redacted] affected the valuation of rights licensed under the iTunes Radio agreement. By dumping his own analysis into an untimely rebuttal submission, SoundExchange has deprived the Services and their experts of the time and opportunity to do just that.

3. Dr. Rubinfeld's Discussion in Section III.E of His Written Rebuttal Testimony is Not Proper Rebuttal

Similar problems plague Dr. Rubinfeld's discussion of the Spotify free service, Nokia MixRadio, Rhapsody UnRadio, and Beats Music's The Sentence in Section III.E of his rebuttal testimony. As described at length in the Services' Motion to Strike, Dr. Rubinfeld does not even attempt to present these as rebutting the Services' direct case – he instead candidly admits they are offered to corroborate his original benchmark. *See* Motion to Strike at 9, 22-23. Only the protracted, unsourced exegesis of these agreements in SoundExchange's Opposition attempts to establish a connection to the Services' direct testimony – and even that argumentation basically reduces to the argument that the rates achieved by the record companies' in negotiation with these services are comparable to Dr. Rubinfeld's rate proposal. *See* Opp. at 26-29.

SoundExchange's Opposition suggests – in a single prefatory sentence – that such purported corroboration somehow "refutes" the Services' critiques of Dr. Rubinfeld's interactive services analysis. For all the reasons discussed in prior sections, that contention fails. Merely presenting an alternative benchmark does not, on its own, "rebut" criticisms of a party's original, different benchmark, or the benchmarks offered by its adversary. Moreover, SoundExchange's citation-free dissertation fails completely to establish that these agreements are either comparable to the Merlin or iHeartMedia benchmarks or "escape" the problems of Dr. Rubinfeld's interactive service valuation (a key, albeit unproven, allegation as to the Apple agreements). Spotify Free, for example, is an *interactive* service. Rhapsody UnRadio, for its part, is not

statutory – it includes numerous non-statutory aspects – and is a subscription service. Nokia MixRadio, as SoundExchange admits, allows for device caching, taking it outside the statutory license. In addition, Spotify Free, Rhapsody UnRadio, and The Sentence [redacted]. Importantly, and contrary to the actual provisions of the Merlin and iHeartMedia agreements, SoundExchange offers only wild speculation about the ability of these services to "steer" performances, but not a word about their actual ability to drive lower rates by doing so. *See, e.g.*, Opp. at 26 (speculating without support that Beats Music "would have an even greater ability to steer than a service like Pandora"). Dr. Shapiro has never suggested that just because a service is non-interactive means that it (a) steers in fact or (b) has used that steering ability to negotiate competitive royalty rates. There is simply no reason that any of these agreements "refute" (or were meant by Dr. Rubinfeld to refute) the Services' criticisms of a different benchmark.

II. SOUNDEXCHANGE HAS FAILED TO JUSTIFY THE UNTIMELY SUBMISSION OF THE CHALLENGED TESTIMONY

SoundExchange clings to the fiction that Dr. Rubinfeld's "corrected" testimony was preemptively written, timely submitted, and merely unredacted two days later. *See* Opp. at 32-33. Even if late, SoundExchange contends that the Services have nothing to complain about because they obtained some Apple-related discovery during the direct phase and could have included an analysis of the Apple agreements in their rebuttal cases had they so chosen, *see* Opp. at 33 – basically, "no harm no foul."

Of course none of that turns what Dr. Rubinfeld did into proper rebuttal testimony. What the Services might themselves have done in their rebuttal cases, and whether they chose to include or exclude analysis of the Apple agreements, is completely irrelevant to that question. It

also does not explain why SoundExchange failed to seek permission to file the late testimony – and instead attempted to slip it in in the guise of a "correction."[9] Nor, for that matter, does SoundExchange attempt to explain how 14 pages of new testimony and 42 pages of new agreements can possibly be construed as a "correction" in the first place. The "corrected" testimony corrected nothing.

SoundExchange's argument also misses the point of the Services' motion, which is not that they lacked information they might have included in amended testimony or rebuttal (*see* Opp. at 6), or lacked information to allow their experts to conduct an "Apple analysis" of their own – although that is certainly true. Rather, the point of the Services' motion is that SoundExchange's gamesmanship has prevented them from analyzing and responding in their written rebuttal testimony to *Dr. Rubinfeld's analysis* of the Apple deals, including his calculations of their "benchmark value" (the figure he claims dispatches all criticisms of his original interactive service benchmark). That the Services might be able to depose Dr. Rubinfeld – or that SoundExchange offered two extra days for the Services to file Apple-related discovery requests – cannot solve that problem.[10]

SoundExchange's "no harm no foul" argument also assumes away several complicating questions. For starters, what, exactly, would the hypothesized "Apple analysis" by the Services have been rebutting? Dr. Rubinfeld, after all, did not discuss Apple in his direct testimony. And what reason is there to believe that SoundExchange would not have moved to strike such

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[9] *See Order Granting SoundExchange's Motion To Strike Testimony of Kurt Hanson* (March 17, 2015) (observing that AccuRadio had failed to ask the Judges for an extension of time to fulfill its discovery obligations and had not attempted to explain its failure to request an extension, and concluding "[t]his is a circumstance where it would have been preferable to ask permission, rather than beg forgiveness").

[10] The fact that iHeart Radio served two document requests related to the Apple agreements thus does not ameliorate the prejudice. Moreover, the fact that a participant attempted to protect itself in the event SoundExchange succeeded with its "corrected" testimony gambit should does not justify the gambit in the first instance.

testimony as merely corroborative of the Services' direct testimony, and not proper rebuttal, just as it has done in prior proceedings? Moreover, if the Services' experts concluded that the Apple agreements were faulty benchmarks (for all the reasons discussed above), what testimony is SoundExchange suggesting they should have filed? Rebuttal testimony explaining why deals that had not been introduced by another party are terrible benchmarks? That is ridiculous on its face.

SoundExchange's "you could have done your own Apple analysis" argument amounts to the contention that the Services could and should have crafted preemptive surrebuttal of the analysis Dr. Rubinfeld did not introduce until the rebuttal round (and two days late at that) – a position SoundExchange knows to be wrong. *See* SX Motion to Strike Portions at 1, 3 (moving to strike testimony based on argument that "it is offered only to bolster Sirius XM's own direct testimony and as preemptive sur-rebuttal of attacks on direct licenses anticipated by Sirius XM"); *cf.* Music Choice Order at 2 ("notwithstanding the availability of discovered information, an expert witness would have to be blessed with extraordinary prescience to be able to offer *responsive opinions in advance* of the completion" of opposing testimony) (emphasis in original).

The Judges' Order Denying, Without Prejudice, Motions for Issuance of Subpoenas Filed by Pandora Media, Inc. and the National Association of Broadcasters (the "Subpoena Order") – recited *ad nauseum* in SoundExchange's Opposition – does not rescue SoundExchange's gamesmanship. The Subpoena Order addressed the *Services'* request for discovery of license agreements and related information in advance of the filing of written direct statements, and was motivated by *the Services'* claims of prejudice relative to SoundExchange by not obtaining such information until after the direct cases were filed. The Judges held, in a nutshell, that the rebuttal

round would provide them sufficient protection against such prejudice: "[i]f a participant receives information and documents during the discovery period, or even shortly thereafter in response to an order compelling discovery or a subpoena, the *moving participants* would have sufficient time to incorporate and utilize the new information and documents in their respective rebuttal cases." *Id.* at 6 (emphasis added). This language – with its focus on what the *moving participants* can do in rebuttal – cannot possibly taken for SoundExchange's more general proposition that "the submission of new evidence on rebuttal, even where previously available to the submitting party, may be proper rebuttal." Opp. at 32. The Subpoena order deals with information received in discovery from the *opposing* party, not information previously in the possession of the *submitting* party.

Moreover, as discussed above, an order about what the Services might or might not have done in their rebuttal testimony is utterly irrelevant to the issue. The issue here is whether *Dr. Rubinfeld's* rebuttal testimony is proper rebuttal – and the prejudice to the services of not being able to respond to that testimony *now*, *after* the rebuttal statement have been submitted. It is no answer – and a cynical distortion of the Subpoena Order – to say the Services are to blame for not inserting preemptive surrebuttal into their rebuttal testimony. The fault here is SoundExchange's, and SoundExchange's alone.

Finally, SoundExchange's argument that iHeartMedia opened the door to the corrected testimony – and allegedly wishes to rely on the Apple Agreements while denying SoundExchange the opportunity to do so, *see* Opp. at 30-31 – does not excuse late testimony. It just means that the testimony was not available by the deadline. More fundamentally, of course, SoundExchange's claim is completely unfounded for all the reasons the Services explained in their moving brief. *See* Motion to Strike at 20-21. No service "submitted" or "relied upon" any

Apple agreement. The testimony of Dr. Kendall on which SoundExchange relies cited a bullet point in a Warner presentation regarding a statement by Apple to Warner about the promotional value of the iTunes Radio service. That the agreement between Apple and Warner included a term that reflected some consideration for that promotional value is completely irrelevant. Dr. Kendall's testimony did not rely on the agreement or any term of the agreement, and the one bullet point he cited refers only to representations as to what Apple "expects" with respect to its promotional value. Unable to escape this fact, SoundExchange is left to rely in its Opposition on a *different* page in the document that Dr. Kendall cites, which purports to tie this statement to the actual agreement. That cannot possibly justify allowing SoundExchange to sandbag the Services with and entirely new and untimely benchmark analysis.

III. THE JUDGES SHOULD NOT EXERCISE THEIR DISCRETION TO ADMIT THE CHALLENGED TESTIMONY

In view of the evident gamesmanship in which SoundExchange engaged in presenting Dr. Rubinfeld's purported "corrected" "rebuttal" testimony, the Judges should decline its invitation to cast aside established precedent to allow the challenged testimony. As described above and in the Motion to Strike, SoundExchange did not confer with any of the Services concerning its intent to file the "corrected" testimony, nor did it move the Judges for leave to do so. Instead, it completed a full analysis of brand-new benchmarks, redacted it, and belatedly uncovered 14 full pages of discussion two days into an already expedited rebuttal phase. There is nothing equitable or fair about permitting such tactics – indeed, the equities point squarely in the opposite direction – and SoundExchange's tactics should be rejected, not rewarded.

The fact that Pandora and NAB postulated, before any discovery had been conducted, that the Apple agreements *might be* important to rate-setting, or the fact that the Judges suggested that the agreements "*could be*" significant to the resolution of this proceeding, *see*

Opp. at 35-36, does not demonstrate that to be the case, or excuse SoundExchange's untimely proffer. SoundExchange's attempt to ambush the Services with new benchmark analysis in the rebuttal stage simply to "corroborate" or "bolster" its own case – in addition to being wrong and prejudicial – cannot be argued to be "critical" to the Judges' task of setting a rate in this action, as best evidenced by the fact that SoundExchange's own record company members agreed with Apple [redacted]. None of the previous decisions cited in SoundExchange's Opposition dictates a different conclusion. *See, e.g.*, *Satellite II* Rebuttal Hearing Tr. (8/15/2012) at 3677:10-3678:2 (denying motion to strike where the challenged rebuttal testimony provided additional examples of benchmark agreements that had already been presented in the direct phase, and where such additional examples responded to criticisms concerning the representativeness of the direct-phase benchmark agreements); *Satellite II* Rebuttal Hearing Tr. (8/14/2012) at 3440:6-18 (same).

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the Services' moving papers, the Services respectfully request that the Judges grant their Motion and strike (a) the Corrected Written Rebuttal Testimony of Daniel Rubinfeld submitted by SoundExchange on February 25, 2015 and (b) Section III.E of Dr. Rubinfeld's originally submitted rebuttal testimony.

Dated: March 20, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 20, 2015, I caused a copy of the foregoing Public version of the Licensee Services' Reply In Further Support Of Their Motion To Strike SoundExchange's Corrected Written Rebuttal Testimony Of Daniel Rubinfeld And Section III.E Of The Written Rebuttal Testimony Of Daniel Rubinfeld to be served by email and first-class mail to the participants listed below:

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